(4)

Supreme Court, U.S.
FILED
[illegible] 2000
CLERK

No. 99-950

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Individually and as Administratrix of the Estate of MICHELLE L. WIGHTMAN, Deceased, and MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS J. MURRAY
Counsel of Record
MARY O'NEILL
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
P.O. Box 19
Sandusky, OH 44871-0019
(419) 624-3000

HARVEY L. FRUTKIN
KERIN L. KAMINSKI
KAREN GIFFEN
CAVITCH, FAMILO, DURKIN & FRUTKIN
14th Floor, East Ohio Building
Cleveland, OH 44114
(216) 621-7860

Attorneys for Respondents

157485

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

78

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Table of Appendices vi

Statement of the Case 1

A. The Train-Car Collision 2

B. The Ohio Supreme Court's Decision 5

Summary of Argument 5

Reasons for Denying the Writ 7

I. The Punitive Award Below Fully Conforms With *BMW v. Gore* 7

II. No Conflict Exists Among The Lower Courts Regarding The Proportionality Analysis Of The Second Guidepost In *BMW v. Gore*. 11

III. There Is No Due Process Issue Arising From The Trial Court's Discretionary Evidentiary Rulings. 14

IV. Petitioner's Recusal Motion Raised No Federal Due Process Issue And Violated Ohio Procedural And Substantive Law Governing Such A Motion 16

Contents

Page

A. Petitioner Did Not Raise a Due Process Issue Below Regarding the Campaign Contributions to Justices Pfeifer and Sweeney. 17

B. Petitioner's Recusal Application Was Dilatory 20

C. Conrail's Motion Below Was Procedurally Improper and Extra-Legal in Nature. 20

D. Petitioner's Representation of Its Motion Below is Substantially Misleading 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson, 520 U.S. 83 (1997) 18

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 18

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 1, 5, 6, 7, 9, 10, 11, 13, 14

Crane v. Kentucky, 476 U.S. 683 (1986) 16

Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc., 121 Idaho 220, 824 P.2d 151 (Ct. App. 1992) 12

FTC v. Cement Inst., 333 U.S. 683 (1948) 18

Huffman v. Hair Surgeon, Inc., 19 Ohio St. 3d 83, 482 N.E.2d 1248 (1985) 16

Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403 (S.D.N.Y. 1996) 12

In re: Disqualification of Light, 36 Ohio St.3d 604, 522 N.E.2d 458 (1988) 20

In re Murchison, 349 U.S. 133 (1955) 19

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) 17, 18

Cited Authorities

Page

Reitz v. Howlett, 106 Ohio App. 3d 409, 666 N.E.2d 296 (9th Dist. Summit Cty. 1995) 16

Tumey v. Ohio, 273 U.S. 510 (1927) 18

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 13

Walston v. Monumental Life Ins. Co., 129 Idaho 211, 923 P.2d 456 (1996) 12

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 19

Webb v. Webb, 451 U.S. 493 (1981) 18

Zoppo v. Homestead Ins. Co., 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994) 1

Cited Authorities

Page

Other Authorities:

Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449 (1988) 19

Canon 3(G)(1) of the Ohio Code of Judicial Conduct 2

Canon 7 of the Ohio Code of Judicial Conduct ... 21

Mark Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich. L. Rev. 382 (1989) 19

Jason Levien & Stacie L. Falka *Cleaning Up Judicial Elections*, 2 Mich. L. & Pol'y Rev. 71 (1997) 19

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeals Of Ohio, Erie County Dated And Decided April 15, 1994 ..... 1a

Appendix B — Excerpts From Trial Transcript Of The Common Pleas Court Of Erie County, Ohio Dated May 20, 1996 ..... 32a

Appendix C — Photograph Of Model Of Accident Site 36a

Appendix D — Cases In Which The Murray & Murray Co., L.P.A. Was Lead Counsel For A Party Or *Amicus Curiae* In The Ohio Supreme Court 37a

Appendix E — Excerpts From Trial Transcript Of The Court Of Common Pleas, Erie County, Ohio Dated October 16, 1990 ..... 39a

Appendix F — Defendant's Motion For Recusal And Continuance Of The Trial 46a

STATEMENT OF THE CASE

Petitioner, Consolidated Rail Corporation ("Conrail"), claims it was denied due process by a punitive award "imposed in a vacuum." Some vacuum. More than ten years ago, two young women died when a Conrail train struck a car at a multi-track, mainline crossing in Sandusky, Ohio after Conrail ignored an explicit police warning that a train standing near the crossing created a danger of a train-car collision. In 1990, a jury found punitive damages should be assessed, and Ohio's Sixth District Court of Appeals upheld the verdict on the basis "there was clear and convincing evidence . . . [of] . . . malice on the part of Conrail." *Wightman v. Consol. Rail Corp.* 94 Ohio App. 3d 389, 408, 640 N.E.2d 1160 (1994), Respondents' Appendix ("Resp. App.") 29a. The Ohio Supreme Court declined to hear the matter.[1]

A second jury, in 1996, assessed punitives at $25,000,000. Conrail sought a remittitur, claiming constitutional excessiveness. The trial court carefully analyzed the evidence in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) and concluded the verdict was not excessive. Nevertheless, it granted Conrail a $10,000,000 remittitur and relief from interest on the judgment. Petitioner's Appendix ("Pet. App.") 64a.

1. Ohio law at the time of the first trial required the jury to determine whether punitive damages should be assessed, after which the judge was to determine the amount. The appellate court found that the trial court, by failing to award punitive damages after the jury's findings, had not complied with the Ohio statute. Resp. App. 29a. After remand, the Ohio Supreme Court ruled litigants are constitutionally entitled to a jury trial on punitive damages. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994). Therefore, the amount of punitives in *Wightman* became a jury issue.

After the appellate court rejected appeals by both parties, the Ohio Supreme Court heard the Wightmans' appeal and Conrail's cross-appeal. It upheld the appellate court's finding that the remitted punitive award was not constitutionally excessive and also affirmed the lower court's decision on evidentiary issues raised by Conrail's cross-appeal. The court reversed the grant of interest relief to Conrail on statutory grounds. Pet. App. 8a-12a.

Two months after oral arguments in the Ohio Supreme Court, Conrail sought to recuse Justices Pfeifer and Sweeney under Canon 3(G)(1) of the Ohio Code of Judicial Conduct on the ground the "appearance of impropriety" had been created because the law firm representing the Wightmans, and relatives of the firm's partners, had made admittedly lawful contributions to the 1998 reelection campaigns of these justices. Pet. App. 76a. This motion raised no federal due process issue, was procedurally improper, and was contrary to Ohio law requiring recusal motions to be filed on a timely basis.

On December 6, 1999, Conrail filed its Petition for a Writ in this Court. Because Petitioner has failed to mention significant parts of the record, correction and clarification are necessary.

A. The Train-Car Collision

On a February evening in 1989, a westbound Conrail train stopped for minor repairs on a double track mainline about 200 feet east of a grade crossing in Sandusky, Ohio, creating a severe obstruction to the ability of southbound motorists to see past the standing train. The train crew knew:

1) the stopped train blocked the ability of southbound motorists to see westbound trains approaching the crossing;

2) high speed, westbound trains were due;

3) heavy Saturday night traffic was proceeding over the crossing; and

4) the gates and lights could not positively signal the approach of another train because they had been disabled by the stopped train from doing so.

Pet. App. 59a.

The conductor immediately recognized the danger but, he explained, rather than implement available measures to prevent a crash, his "only option" under Conrail's operating procedures was to have the crew make the minor repairs necessary to get the train moving again. About 20 minutes prior to the collision, a police officer arrived, saw there was a possibility of a collision, and immediately requested his dispatcher to notify the railroad. Minutes later, the officer was advised by radio Conrail had been notified of the danger, and he left. Conrail ignored the warning. Although the train was stopped for about an hour, the railroad, following a longstanding operating practice, took no measures to prevent a collision. Pet. App. 51a, 60a-61a.

Fifteen minutes after the police warning, Michelle Wightman, operating her mother's 1985 Ford, approached from the north in a stream of southbound traffic. As she drove onto the crossing at about 5 mph and attempted to see past

the standing train, the obstruction was so severe the car was already in harm's way when a 60 mph freight train suddenly emerged. According to witnesses, the occupants of the car "didn't have a chance."[2] Pet. App. 51a and Resp. App. 32a-34a.

The Wightmans showed how a train standing near a mainline crossing, combined with a system disabled from signaling the approach of a second train, creates a great danger of a crash — a fact known for 30 years in the railroad industry. According to a retired railroad engineer with 43 years experience, about 99% of drivers proceed over the crossing under these conditions. The engineer of the stopped train, who had a clear view of the crossing throughout the period prior to the crash, did not observe a single car turn around. The Wightmans also showed how, without slowing railroad operations, various measures could easily have eliminated the possibility of a collision. Although Conrail's dispatcher and the engineer had continuing radio communications, and both knew high speed trains were due, neither did anything to protect against a collision. According to Dr. William Berg, a civil engineer with a special expertise in grade crossing safety, many collisions happen under conditions "substantially similar" to those at the Sandusky crossing. Pet. App. 39a.

Notwithstanding the six-year lapse between trials, the conductor of the stopped train testified in the second trial that he had not been instructed by Conrail in the interval to do anything differently, if he encountered the same situation. One of Conrail's middle managers conceded that

2. Resp. App. 36a depicts a model used by witnesses to show the position of trains and the Wightman vehicle moments before the collision.

unscheduled stops for minor repairs, like that near the Sandusky crossing, is "the type of thing . . . [that] . . could occur at so many locations" in Conrail's system. Pet. App. 59a-63a; Resp. App. 35a. As in the first trial, Conrail offered no explanation for ignoring an explicit police warning at least 15 minutes prior to the collision.

B. The Ohio Supreme Court's Decision

After meticulously applying the due process framework in *BMW v. Gore*, the court concluded the remitted punitive award of $15,000,000 was not excessive and "did not violate Conrail's due process rights." *Wightman v. Consol. Rail Corp.*, 86 Ohio St. 3d at 439, 715 N.E.2d 546 (1999), Pet. App. 19a. In view of Petitioner's challenge to the impartiality of Justices Pfeifer and Sweeney, it is important to note it was the Wightmans who first appealed the rulings of Ohio's Sixth District Court of Appeals and that Justices Pfeifer and Sweeney ruled against them on the main issue raised by their appeal, namely, whether it was an abuse of discretion by the trial court to grant a $10,000,000 remittitur, without a finding of excessiveness. Since two of the justices agreed with the Wightmans on this point, had Justices Pfeifer and Sweeney not voted as they did, Conrail might well face a $25,000,000 punitive award, plus interest — a liability nearly double that under the rulings supported by Justices Pfeifer and Sweeney as part of the majority. On this score, it seems Conrail will not take "yes" for an answer.

SUMMARY OF ARGUMENT

Petitioner has plainly failed to present any proper basis for a writ. First, the decisions below reflect a deep respect for the notion of due process expressed in *BMW v. Gore*. At

each stage, the Ohio courts reviewed the record with arduous attention to the due process considerations embodied in *BMW*. The decision of the Ohio Supreme Court, in particular, accorded to Conrail precisely the kind of reasoned and balanced analysis required by the three guideposts in *BMW*. Although three justices of the Ohio Supreme Court dissented in part with respect to some rulings below, none did so on the basis the remitted punitive award was excessive under the guidelines set forth in *BMW*. The upshot is, one trial judge, three appellate judges, and seven justices of the Ohio Supreme Court concluded the punitive award was not unconstitutionally excessive.[3]

Contrary to petitioner's assertion, there is no conflict among the lower courts as to the application of the proportionality analysis in *BMW*. Nor does the record support Conrail's attempt to bootstrap an ordinary discretionary evidentiary ruling of a state court into a deprivation of due process.

Finally, Conrail's attempt to use admittedly lawful campaign contributions to raise a due process issue for the first time in this Court disregards this Court's jurisprudence regarding when a federal question may properly be raised here.

---

3. One of the justices believed the award was based on wrongful death as well as property damage, and thus was excessive under Ohio law.

REASONS FOR DENYING THE WRIT

I. THE PUNITIVE AWARD BELOW FULLY CONFORMS WITH *BMW v. GORE*

The Ohio Supreme Court noted that the *BMW* court described the degree of reprehensibility of defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award . . . [and] . . . that BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at 575, 576. In its constitutional analysis, the Ohio Supreme Court applied this criterion of reasonableness as follows:

> It is with this guidepost, the most important one, that this case distinguishes itself the most from BMW. Ineffective gates at a railroad crossing are of a completely different character than a painted-over scratch on a luxury automobile. Literally and figuratively, we are dealing with the difference between a scratch and a cataclysm — the difference between a practice that might affect the value of an automobile by ten percent, and a practice that could result in massive property damage, physical injuries, and untold psychological pain. Conrail evinced a disregard of the danger it posed to the health and safety of motorists.
>
> In this case, Conrail employees did nothing to warn drivers of oncoming trains, despite the fact that they saw vehicles crossing the track by driving around the gates. Even after a phone call from police, Conrail did not take preventative

> measures to avert an accident. According to the trial judge, this tragic case has done little to persuade Conrail to change, citing Conrail's "corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced the catastrophic collision needs to be changed."
>
> We find that Conrail's conduct reaches the level of reprehensibility sufficient to warrant the substantial punitive damages award the jury imposed in this case.

Pet. App. 16a.

It is significant that the trial court, in reviewing the record, made the following statement regarding Conrail's attitude toward public safety at its grade crossings:

> The Court . . . feels compelled, as a matter of public safety, to do everything in its power to insure . . . Conrail promptly changes the practice which produced this unnecessary tragedy. After much reflection, the Court has concluded that the most effective way to deter Conrail from continuing this practice is to limit the jury's verdict to an amount which will sufficiently punish Conrail and create a positive inducement to change its practices, rather than continue to challenge the findings of the earlier jury and the Court of Appeals.

Pet. App. 64a. The foregoing statement is a pointed reference to the fact that Conrail did nothing during the six-year interval between trials to correct the operating practice behind

this train/car collision. It is precisely this kind of conscious indifference for the rights and safety of others which this Court, in *BMW*, made the touchstone for determining reasonableness in cases where, as here, the defendant's conduct threatens the rights and safety of human beings.

As to the second indicium, the ratio of punitive damages to the actual harm inflicted on the plaintiff, the Court relied directly on the *BMW* analysis. The court pointed out that Ohio law, consistent with *BMW*, "has consistently rejected the notion of a bright-line mathematical formula for the computation of the reasonableness of punitive damage awards." It, therefore, concluded: "We see the ratio between compensatory and punitive damages as less relevant here because of the egregiousness of the act." Pet. App. 17a.

Finally, the court analyzes the third *BMW* indicium, namely, civil or criminal penalties that could be imposed for comparable misconduct:

> Conrail claims to have violated no Ohio statutes on the night of the accident. Conrail argues that even if it had not fully complied with all laws, the maximum federal penalty for the willful failure to comply with an order to remedy a violation of signal-system safety regulations that creates an imminent danger of death or injury is $22,000 per violation. Section 209.409, Title 49, C.F.R.
>
> But the *BMW* case and its civil penalties are a world away from this case. *BMW* requires that the penalties imposed be for comparable misconduct. In *BMW*, the $2,000 fine actually applied to the specific conduct of the defendant

> that was at issue. The $22,000 fine Conrail refers to does not apply to the specific conduct involved in this case. The $22,000 fine applies to the failure to comply with an order to remedy a violation of signal-system safety regulations. An order has to have been made and disregarded by the railroad company for the fine to be imposed. It is not a fine for causing a death.

Pet. App.18a. The court commented that Conrail's conduct here was so egregious it could constitute involuntary manslaughter under Ohio's criminal code and that "the applicable criminal and civil penalties available were comparable to the punitive damages award." Pet. App. 19a.

On the basis of the constitutional framework provided by *BMW v. Gore*, the Ohio Supreme Court concluded:

> In considering the three guideposts set forth by the court in *BMW*, we find that Conrail had fair notice of the conduct that would subject it to punishment as well as the severity of the possible punishment. The award in this case was not grossly excessive and did not violate Conrail's due process rights.

Pet. App. 19a.

II. NO CONFLICT EXISTS AMONG THE LOWER COURTS REGARDING THE PROPORTIONALITY ANALYSIS OF THE SECOND GUIDEPOST IN *BMW v. GORE*.

In *BMW v. Gore*, one of the three "guideposts" for ascertaining whether the size of a punitive award is unconstitutionally excessive is whether there is a reasonable relationship between punitives and the harm caused by the defendant's conduct. *Id.* at 581. Petitioner states that "the lower courts are in conflict on how to apply the second guidepost" and argues the states will continue to be "perplexed" and "confounded" by this issue until this Court intervenes to "provide much-needed guidance." Petition at 2, 10, 20. The claimed conflict Conrail points to is an alleged split among the lower courts as to whether, in assessing proportionality between the punitive and compensatory awards, a court may consider harm for which the state does not permit a recovery of punitive damages. Specifically, Conrail contends the *Wightman* court considered the wrongful death of Michelle Wightman, in addition to the property damage, in assessing the extent of the potential harm engendered by Conrail's dangerous operating practices. Conrail urges this Court to resolve this "conflict" by rejecting the approach of those lower courts, with whom Ohio's high court is allegedly arrayed, that evaluate punitive damages by considering "all of the damages awarded to a plaintiff, including amounts awarded for claims that would not themselves be subject to punitive damages." Petition at 23. However, as we will show: (1) there is no conflict in interpretation; (2) the Ohio Supreme Court strictly complied with the teachings of *BMW*; and (3) the punitives were not unconstitutionally excessive.

Conrail cites *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 923 P.2d 456 (1996), to support its assertion there is a conflict as to an important federal question. Conrail suggests the Idaho and Ohio Supreme Courts are the only state courts of last resort that incorporate into their proportionality analysis damages that do not support a punitive award under state law.[4] However, petitioner has misunderstood Idaho law. Conrail relies on *Walston* for the proposition that Idaho takes into consideration the harm caused by a breach of contract in assessing the excessiveness of a punitive award, with the suggestion a breach of contract will not support an award of punitives. Idaho, however, is one of the states that actually *permits* an award of punitives for breach of contract, at least where the breach is malicious and conducted with total disregard for the interests of the other party. *See, e.g., Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc.*, 121 Idaho 220, 824 P.2d 151 (Ct. App. 1992). As such, Idaho falls into line with the teachings of the other cases cited by Conrail.

As to Ohio, it is clear, contrary to Conrail's assertion, the *Wightman* court did *not* factor wrongful death into its proportionality analysis:

> The injury here was catastrophic and could have been financially more so. We are not persuaded that if Michelle Wightman had been driving a

---

4. Conrail also cites *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996). A review of that decision, moreover, does not disclose that the federal district court considered conduct for which no punitives could be awarded in its assessment of proportionality. In any event, only conflicts between or among the federal circuit courts of appeal or among the states' highest courts should merit a writ.

> $40,000 BMW that would make a more acceptable ratio. An expensive car does not make the award more legitimate. The award stands on its own. This case offers one of those particular instances where a particularly egregious act has resulted in a small amount of economic damages.

Pet. App. 17a. This statement reflects a keen awareness of the difference between Wightman's economic damages and the damages based on her wrongful death claim. Accordingly, Petitioner fails to establish a conflict as to how this Court's proportionality guidepost is being interpreted by the lower courts.

Conrail also asserts, regardless of any conflict, the punitives in *Wightman* violate *BMW* criteria because the ratio of the punitive damages awarded is disproportionate to the actual damages. Petitioner again misstates the law. This Court has made clear the proper ratio analysis is to ascertain "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *BMW*, *supra*, at 581, citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993). (Emphasis in original.) Thus, where the potential for great harm is substantial, "even low compensatory damages may support a higher ratio than high compensatory damages." *BMW* at 831. In *BMW*, unlike the instant case, substantial potential harm was not an issue. As this Court observed, "there is no suggestion that Gore or any other BMW purchaser was threatened with additional potential harm." *Id.* at 830. Pivotal to that analysis was the fact the harm engendered by BMW's corporate decision to repaint luxury

automobiles was, *ipso facto*, limited to a decrease in the economic value of the car; no additional harm was threatened.

Conrail also suggests the Court revert to the mindless application of a mathematical litmus test to determine the constitutionality of a punitive award by comparing the ratios of punitive to actual damages in various cases. ("[T]he punitive damages award in this case cannot stand, as a ratio of 6,250 to 1 is drastically greater than the ratio found constitutionally deficient in *Gore*." Petition at 24.) Conrail neglects to mention this is an approach "consistently rejected" by this Court. *BMW* at 582. As the Ohio Supreme Court points out, the harmful nature of Conrail's conduct would not change if, instead of having destroyed a used Ford Tempo, it had demolished a BMW worth $40,000. Pet. App. 12a, 17a. Presumably, the ratio in the latter instance would be more acceptable to Conrail, being 325 to 1. Thus, as this Court did in *BMW*, the Ohio court recognized the absurdity of using an arbitrary ratio as determinative in cases where, as here, the defendant's conduct consciously disregards the lives and safety of people.

III. THERE IS NO DUE PROCESS ISSUE ARISING FROM THE TRIAL COURT'S DISCRETIONARY EVIDENTIARY RULINGS.

Conrail claims it was denied a fair trial because of evidentiary rulings. According to Conrail, the trial court prevented it from presenting expert testimony regarding the facts and circumstances surrounding the collision and from showing that Michelle Wightman "had consumed several alcoholic beverages on the night in question." Petition at 4, 18. The truth is Conrail had the opportunity to present more evidence in the second trial than it had offered in the

first, had it chosen to do so. Although the railroad did not designate an expert reconstructionist in the first trial, it did so in the second and the record is crystal clear the only reason Conrail did not call its designated reconstructionist to testify is it chose not to do so.[5]

Furthermore, Conrail's assertion in this court that Michelle Wightman "consumed several alcoholic beverages" is pure invention. The only evidence regarding alcohol consumption was that a witness had seen Michelle taking two sips of wine cooler and that she had a blood alcohol

---

5. During the trial, this occurred:

> *Wightmans' counsel*: . . . you're going to bring in a reconstructionist. Yesterday you introduced the fact, you suggested that you could see the headlights.
>
> *Conrail's counsel*: I'm not — who said I'm bringing in a reconstructionist?
>
> *Wightmans' counsel*: You said in your opening statement that you could see the headlight and you're suggesting for something like twelve seconds . . .
>
> *Conrail's counsel*: Am I going to be allowed to bring in that person here to show that Judge?
>
> *Wightmans' counsel*: I would think if he can show that she could see the headlight for twelve seconds, of course, he should be able to bring . . .
>
> *The Court*: Sure. He didn't have a problem with that. So I will let you do that.

Resp. App. 34a-35a.

level of one-third the legal limit. Resp. App. 39a-45a. The Ohio Supreme Court upheld the appellate court's ruling that the trial court had not abused its discretion by excluding evidence "showing Michelle Wightman had consumed a small amount of alcohol prior to the conclusion . . ." Pet. App. 9a.

Under Ohio law, a trial court's exclusion of evidence can be reversed only upon a showing of a clear abuse of discretion that materially prejudiced the objecting party. *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248 (1985); *Reitz v. Howlett*, 106 Ohio App. 3d 409, 666 N.E.2d 296 (9th Dist. Summit Cty. 1995). Conrail's arguments regarding the exclusion of evidence, therefore, are but an attempt to bootstrap proper discretionary rulings into errors of constitutional dimensions. These evidentiary rulings, moreover, are different in kind from those described in the cases cited by Conrail where criminal defendants were precluded from introducing critical exculpatory evidence due to a mechanistic application of the state's evidentiary rules. Indeed, the cases cited by Conrail underscore this Court's "reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane v. Kentucky*, 476 U.S. 683 (1986).

IV. PETITIONER'S RECUSAL MOTION RAISED NO FEDERAL DUE PROCESS ISSUE AND VIOLATED OHIO PROCEDURAL AND SUBSTANTIVE LAW GOVERNING SUCH A MOTION

Petitioner invites this Court to determine the "fairness of Ohio's system of electing judges and financing their campaigns" because of contributions to the reelection

campaigns of Justices Pfeifer and Sweeney by members of the firm representing Darlene Wightman and family members of its partners which, says Conrail, compromised its due process right to an impartial appellate review. This assertion is devoid of merit on several grounds.[6]

A. Petitioner Did Not Raise a Due Process Issue Below Regarding the Campaign Contributions to Justices Pfeifer and Sweeney.

Petitioner for the first time raises a federal question here. Specifically, it claims an infringement of due process "because large financial contributions to a judge from a lawyer with a case pending before the judge certainly create the appearance of a *quid pro quo*." *Id.* at 12-13. Conrail's motion below, however, relied solely upon alleged violations of Ohio Code of Judicial Conduct which, as this Court has made clear, cannot give rise to a matter reviewable in this Court. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590

---

6. Prior to the second trial and while the issue of a litigant's constitutional right to a trial by jury on punitives was pending in the Ohio Supreme Court, Conrail requested Judge Ann B. Maschari, who presided at the first trial, to apply the very statute whose constitutionality was under review, and to set the amount of damages herself. When she refused this request, Conrail filed a motion asking Judge Maschari to recuse herself from further participation in the case, which she did. Resp. App. 46a-47a. The case was assigned to the Honorable Joseph Cirigliano who, as noted above, reduced the award by $10,000,000 and granted Conrail interest relief. Conrail's recusal motion, therefore, challenged the impartiality of two justices who had voted to uphold the remittitur granted Conrail by Judge Cirigliano. In short, this Petition is about Conrail's unhappiness with the size of an already remitted punitive award that might well have been much larger had Justices Pfeifer and Sweeney agreed with the Wightmans' contention the remittitur was improper under Ohio law.

(1875). Petitioner has thus failed to meet its burden of showing it properly presented a federal claim to the Ohio Supreme Court and, therefore, there is no basis for a writ. As this Court observed in *Adams v. Robertson*, 520 U.S. 83 (1997), "it would be unseemly to our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have the occasion to consider." *Id.* at 210, citing *Webb v. Webb*, 451 U.S. 493, 500 (1981).

Moreover, this Court has clearly stated most matters relating to judicial qualification do not rise to a constitutional level. The balancing of such factors as kinship, personal bias, state policy, and remoteness of interest are generally left to legislative discretion. *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Indeed, even where bias or prejudice exists, and even where there is a failure to adhere to the local code of judicial conduct, such infirmities alone do not constitute a violation of due process. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

Moreover, in an effort to force this case into a constitutional framework, Conrail focuses on language in various opinions holding that a litigant need not show a judge's decision was actually influenced by a personal interest in the case. Conrail, however, ignores the required predicate before issues of bias arise; in each of the cases cited, there was the requisite direct interest in the outcome. *See, e.g., Lavoie, supra* (The judge's opinion had the clear and immediate effect of enhancing both the legal status and settlement value of his own case); *Tumey, supra* (The mayor who presided over the case was personally and financially interested in the decision, for under state law at the time, he would receive no fee unless he found the defendant guilty);

Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (The fees produced from the mayor's court accounted for a substantial portion of municipal revenues); *In re Murchison*, 349 U.S. 133 (1955) (A judge serving as a "one-man grand jury" in investigating a crime cannot later preside over a contempt hearing for actions that took place during the grand jury proceedings). Tellingly, Conrail cites no case where a judge was disqualified for the receipt of lawful campaign contributions.

As noted by the authorities cited in Conrail's brief, the states have addressed the appropriate balance to be struck between the interests of full participation by attorneys in the election process with the need to ensure judges are insulated from potential for bias. Most commentators, including those cited by Conrail, suggest striking that balance by limiting the amount and specifying the timing of financial contributions. *See, e.g.*, Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449 (1988); Mark Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich. L. Rev. 382 (1989); Jason Levien & Stacie L. Falka *Cleaning Up Judicial Elections*, 2 Mich. L. & Pol'y Rev. 71 (1997). This is exactly the balance struck by Ohio in its adoption of Canon 7 of the Ohio Judicial Code. Ohio has enacted limitations both upon the amount of contributions to election campaigns of Supreme Court justices and the period within which those donations may be solicited. These limitations, among the most restrictive in the nation, were strictly complied with by Justices Pfeifer and Sweeney.

B. Petitioner's Recusal Application Was Dilatory

Under Ohio law, a party who fails to act promptly in seeking to recuse a judge will be deemed to have waived his or her objections, except in "extraordinary circumstances." *In re: Disqualification of Light*, 36 Ohio St.3d 604, 522 N.E.2d 458 (1988). Petitioner attempts to gloss over this requirement by asserting "after the oral argument, Conrail obtained the final post-election campaign finance reports of two justices of the Supreme Court . . . both of whom had been reelected just prior to the November, 1998 argument," Petition at 7, 8. This implies the campaign finance reports were not public knowledge, until *after* oral arguments. The truth, however, is all Murray contributions were first publicly reported on April 23, 1998, one month prior to the date on which Conrail filed its first brief on the merits and nearly seven months prior to oral arguments. Petitioner offers no explanation for this delay or, for that matter, how it manages to find an appearance of impartiality by two justices who affirmed a $10,000,000 remittitur to a verdict the trial court found was not constitutionally excessive. Thus, because Conrail has failed to establish that its federal claim was presented to the Ohio court in a timely and proper manner, its application for a writ should be denied.

C. Conrail's Motion Below Was Procedurally Improper and Extra-Legal in Nature.

Conrail's motion below did more than seek the recusal of two justices. Under the heading "background," Petitioner sets forth what amounts to a "Statement of the Case" from Conrail's point of view, including numerous factual contentions of no relevance to the subject matter of the motion. Such a filing, nearly two months after presentation

of oral arguments, was entirely improper and raises the inference Conrail was using this motion to influence the Court on the merits. This impropriety rendered the motion extra-legal and, therefore, it is unfair to criticize the Ohio Supreme Court for not formally responding to it. This can fairly be seen as an abuse of the judicial process that was, in a fundamental sense, an attack on the very procedures that undergird our notion of due process.

D. Petitioner's Representation of Its Motion Below is Substantially Misleading

It is one thing to lay out facts, quite another to use characterizations that have no factual basis. The petition repeatedly uses terms such as "questionable contributions," "ethical questions," and "issue of impropriety" to insinuate something for which there is simply no basis. These invidious characterizations are used to support an argument regarding Canon 7 of the Ohio Code of Judicial Conduct for which there is no authority, namely, the notion that contributions by different individuals can be aggregated to create both an ethical violation and due process issue. The Murray firm consists of nine partners, whose families span three generations and consist of nearly 100 people. Because of the nature of this firm's practice, there has probably not been a time in the past 15 years when the Murray firm has not had at least one major case pending in the Ohio Supreme Court.[7] Throughout that period, the law firm has openly exercised

7. Resp. App. 37a is a list of cases, most of which are published in the 2000 edition of *Martindale-Hubbell*, in which the Murray firm was either lead counsel for a litigant or *amicus curiae* in the Ohio Supreme Court in the past two decades. This list does not include many more cases in which the Murray firm petitioned the Ohio Supreme Court for a discretionary review.

its right to support judicial candidates of its choice, within the bounds of Ohio's campaign rules. There has never been the slightest suggestion of any impropriety against the firm or its members. Conrail's position, therefore, necessarily leads to the conclusion, unless all firms are ethically bound to impose limitations on the number of partners who may support the candidate of his or her choice, the Murray partners, not to mention family members, are precluded from contributing solely by virtue of their relation by blood — a proposition tantamount to a Bill of Attainder.

Conrail also implies a connection between the campaign contributions and the Murray firm's "stake" in the outcome of the case. This, says Petitioner, makes its right to a fair trial "more acute" because the plaintiff's law firm has "millions of dollars in fees at stake in the outcome of a pending appeal." Petition at 13. This is a highly misleading assertion. For one thing, Darlene Wightman has assigned fifty percent of the punitive damages recovered to the Wightman Charitable Foundation. The Murray firm, therefore, will receive much less than one-third of the punitive award for ten years of work to hold Conrail accountable for conduct shown to be consciously disregardful of the lives and safety of people for decades.

Conrail also asserts the Ohio Supreme Court "for the first time ruled that post-judgment interest could run on punitive damages, thereby increasing the already excessive penalty by approximately one-third, or by more than $5,000,000." Petition at 15. This implies a connection between the post-judgment interest ruling and the contributions. Conrail, however, fails to mention that this ruling was based upon unambiguous language in Ohio's post-judgment interest statute, a reading that was concurred in by all seven justices.

CONCLUSION

For the reasons set forth, the Petition should be denied.

Respectfully submitted,

THOMAS J. MURRAY
Counsel of Record
MARY O'NEILL
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
P.O. Box 19
Sandusky, OH 44871-0019
(419) 624-3000

HARVEY L. FRUTKIN
KERIN L. KAMINSKI
KAREN GIFFEN
CAVITCH, FAMILO, DURKIN
& FRUTKIN
14th Floor, East Ohio Building
Cleveland, OH 44114
(216) 621-7860

Attorneys for Respondents

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF OHIO, ERIE COUNTY DATED AND DECIDED APRIL 15, 1994

WIGHTMAN, Admr., et al.,

Appellees and Cross-Appellants,

v.

CONSOLIDATED RAIL CORPORATION et al.,

Appellants and Cross-Appellees.*

Court of Appeals of Ohio,
Erie County.

No. E-92-75.

Decided April 15, 1994.

* * *

ABOOD, Presiding Judge.

This is an appeal and cross-appeal from a judgment of the Erie County Court of Common Pleas which, following a jury trial, awarded $1,000,000, the amount of the jury verdict, in compensatory damages to the estate of Michelle Wightman.

---

* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1994), 70 Ohio St.3d 1442, 638 N.E.2d 1044.

Appendix A

Defendant-appellant Consolidated Rail Corporation ("CRC") sets forth the following assignments of error:

"I. The trial court erred in failing to direct a verdict in appellant's favor at the close of all the evidence, finding the negligence of plaintiff's decedent was the sole proximate cause of the accident at issue.

"II. The trial court erred and denied appellant a fair trial as a matter of law in connection with the jury charge as follows:

"1. In refusing to instruct and submit appellant's interrogatory to the jury regarding the willful and wanton misconduct of the decedent and in giving a punitive damage charge as to appellant;

"2. In failing to instruct and submit appellant's interrogatory to the jury concerning the intervening and superceding acts of the City of Sandusky Police Department;

"3. By instructing the jury in a contradictory and confusing manner and in providing erroneous instructions of law;

"4. By failing to submit required verdict forms to the jury; and

"5. In other instructional errors manifested in the record.

"III. The trial court erred and denied appellant a fair trial in the admission of evidence as follows:

Appendix A

"1. By admitting over objection expert's opinions inadmissible under Rules of Evidence 701 through 705;

"2. By admitting over objection testimony of plaintiff's witnesses on matters of law and on facts not of record;

"3. In permitting plaintiff's witnesses to testify over objection as to the private, inter-company rule of defendant.

"IV. Other errors at law occurring at time [of] trial and brought to the attention of the trial court by the appellant."

Plaintiffs-appellees, Darlene M. Wightman, administrator of the estate of Michelle L. Wightman, deceased, and Darlene M. Wightman, individually, set forth the following assignments of error on cross-appeal:

"I. The trial court erred by refusing to submit the issue of punitive damages to the jury on Darlene Wightman's property damage claim.

"II. The trial court erred in refusing to award punitive damages, attorneys fees, and costs to Darlene Wightman.

"III. The trial court erred in refusing to order Conrail to pay interest at the statutory rate on one million dollars from the date of the jury's verdict or, in the alternative, for each day entry of judgment has been delayed as a result of defendants' motion to disqualify."

The facts that are relevant to the issues raised on appeal are as follows. On February 19, 1989, at approximately 12:05

a.m., the decedent, Michelle Wightman, was driving her mother's 1985 Ford southwest on Remington Avenue approaching a railroad crossing in the city of Sandusky. A short distance to the east of the crossing, a train owned and operated by CRC was stopped for repairs on the tracks closest to Michelle. When she got to the crossing, the gates were down and the red lights were flashing. Michelle proceeded to drive around the gates and began to cross the railroad tracks when another train owned by CRC that was traveling westbound on a second set of tracks appeared from behind the stopped train and struck Michelle's car, killing her and her passenger instantly.

On September 12, 1989, Michelle's mother, appellee Darlene Wightman, acting both in her capacity as administrator of Michelle's estate and individually, brought suit against CRC and the train's engineer, appellant Louis Nelson. The complaint set forth two causes of action. The first cause of action contained four counts. Count one set forth a claim for wrongful death which alleged: (1) that CRC was negligent in permitting the stopped train to stand in such close proximity to the crossing and obstruct the ability of motorists to observe a second train approaching without taking reasonable precautions to protect motorists; (2) that CRC was negligent in operating a train at a speed which created a foreseeable risk of injury or death; (3) that CRC was negligent in failing to train and advise its crews as to what reasonable measures should be taken in such circumstances to protect motorists; and (4) that Nelson was negligent in failing to reduce the speed of his train as he approached the crossing, in failing to notify the crew of the disabled train that he was approaching the crossing at such a

high rate of speed and in failing to give adequate warning to motorists that his train was approaching the crossing.[1]

Count two of the first cause of action set forth a survivorship claim.[2] Count three of the first cause of action set forth a claim for funeral and burial expenses.[3]

In count four of the first cause of action, appellees alleged: (1) that CRC had habitually permitted similar circumstances to exist at various points in its system which has resulted in numerous deaths and injuries; (2) that CRC failed to take reasonable steps to protect motorists at the crossing, despite the fact that it had actual knowledge for approximately one hour prior to the decedent's death, that a situation existed in which harm was certain or substantially certain to occur; and (3) that these acts and omissions constitute an intentional, wanton and reckless disregard for human life and the safety of the public, which conduct bars appellants from avoiding liability in this action because of any alleged acts or omissions on the part of the decedent. For their first cause of action appellees requested a minimum of $79,500 in compensatory damages.

---

1. Although there is no judgment entry in the record which dismissed Nelson, at the conclusion of the evidence the parties stipulated that Nelson could be dismissed from the case.

2. There is no judgment entry in the record which dismissed this claim, however, it does not appear that it was pursued at trial since the evidence did not support such a claim.

3. There is no judgment entry in the record as to any disposition on this claim.

Appendix A

The complaint's second cause of action set forth Darlene Wightman's personal claim for property damage, for the loss of her automobile as a result of appellants' negligence and "intentional, wanton and reckless misconduct." For this cause of action, appellee Darlene Wightman requested compensatory damages in excess of $1,000 and as well as punitive damages in excess of $25,000.

On December 18, 1989, appellants filed their answer and on October 3, 1990, appellees filed an amended complaint which amended their requests for compensatory and punitive damages. On October 16, 1990, the case proceeded to trial by jury. At the conclusion of appellees' case, appellants moved for a directed verdict, which the trial court denied. At the conclusion of all of the evidence, the court denied both appellants' renewed motion for a directed verdict and appellees' motion for directed verdict. The case was then submitted to the jury with eight interrogatories.

On October 30, 1990, the jury entered a verdict in favor of the estate of the decedent in the amount of $1,000,000. By its response to the interrogatories, the jury: (1) found that the $1,000,000, exclusive of funeral and burial expenses, would compensate the estate of the decedent without regard to the negligence of either party; (2) apportioned the negligence of the parties to the accident as sixty percent to appellant CRC and forty percent to the decedent; (3) found that appellant CRC "authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrated 'malice' * * * and that such malice was, by clear and convincing evidence a proximate cause of the accident"; and (4) found that appellant CRC should be liable for punitive damages.

Appendix A

On October 31, 1990, the court filed its judgment entry which set a hearing on the punitive damages for November 3, 1990. On November 13, 1990, before the proceedings on punitive damages were concluded, appellants' attorney filed an affidavit of bias or prejudice against the trial judge in the Supreme Court of Ohio. Because of this filing, the trial court stayed further proceedings on the case pending determination of the issue of disqualification. On February 11, 1991, the affidavit of disqualification was found not well taken. On May 20, 1991, the trial court filed its judgment entry which set a further hearing on the punitive damages for June 14, 1991. After further continuances, the hearing on punitive damages was ultimately held on August 9 and September 20, 1991.

Prior to that hearing taking place, however, on June 10, 1991, CRC filed a motion for judgment notwithstanding the verdict as to the punitive damage award. In support of its motion, CRC argued that: (1) punitive damages are not recoverable in a wrongful death case and therefore punitive damages could only be awarded as to Darlene Wightman's property damage claim; (2) Wightman could only prevail on her claim for compensatory damages if the jury determined that CRC's negligence exceeded Michelle Wightman's; (3) since the trial court refused to charge the jury on CRC's defense of comparative negligence and the jury never considered that issue, no judgment can be properly entered on her property damage claim and, therefore, the punitive damage award was not proper; (4) punitive damages cannot be awarded on Darlene Wightman's claim since no verdict was ever entered in her favor; (5) while the parties did stipulate as to the amount of compensatory damages to

which Darlene would be entitled upon a finding of liability, there was no stipulation as to liability on that claim; (6) there is no evidence in the record from which the jury could properly have found that CRC acted with malice and, therefore, the punitive damage award was not proper; and (7) that the award of punitive damages is unconstitutional since it violated the Due Process and Excessive Fines Clauses of the United States Constitution.

On November 21, 1991, appellants filed a "post-trial consolidated brief and motion for new trial." In this brief, appellants set forth the issues in the case that remained to be resolved before the entry of final judgment, which included: (1) appellees' request for attorney fees, costs and interest on the award from the date of the verdict; (2) whether appellee Darlene Wightman was entitled to a punitive damage award since there was no judgment entry or verdict on her property damage claim; and (3) whether appellee Darlene Wightman was entitled to a punitive damage award based upon the amount of actual damages that she sustained. Appellants also requested a new trial in order to "prevent a manifest miscarriage of justice," primarily citing the issue of the decedent's comparative fault and the fact that the jury was not instructed that the decedent's conduct could have been found to be willful and wanton.

On February 11, 1992, the trial court filed a judgment entry in which it summarily denied CRC's motion for judgment notwithstanding the verdict without setting forth any reason for the denial. On November 10, 1992, the trial court filed a judgment entry in which it summarily denied appellants' motion for new trial, again without setting forth

any reasons. In that same entry the trial court entered judgment in favor of the estate of Michelle Wightman in the amount of the jury's verdict of $1,000,000 in compensatory damages, but awarded no punitive damages. The trial court noted on the judgment entry that there was no just cause for delay. Thereafter both parties filed a notice of appeal.

Before we address the parties' specific assignments of error, this court feels compelled to state that it has been difficult at best to consider the issues raised on appeal due to the failure of the trial court to set forth in its various judgment entries any basis for its denials of the parties' motions or the basis for its denial of punitive damages. This court and the parties have therefore been left to speculate as to the basis for the court's rulings. Our review of this case has been further complicated by the fact that not all of the claims and parties to this suit have been disposed of. Although the court did use the requisite Civ.R. 54(B) language, we fail to see why it did not dispose of the remaining claims.

I. APPEAL

A

In its first assignment of error appellant asserts that the trial court erred by failing to direct a verdict in its favor at the close of the evidence. In support of this assignment of error appellant argues that when the decedent proceeded around the gates and across the railroad tracks, she violated both state and municipal law governing motorists' conduct at railroad crossings, as well as a common-law duty to look

and listen, and such violations constituted negligence per se. Appellant also argues that the evidence demonstrates that the decedent intentionally violated these laws and the crossing warnings and that had she not done so the accident would not have occurred and, therefore, the sole cause of the accident was the decedent's own negligence.

Appellees respond that the cases of *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453, and *Brown v. Consol. Rail Corp.* (Oct. 11, 1991), Erie App. No. E-90-35, unreported, 1991 WL 253917, are dispositive of this issue. Appellees submit that, pursuant to that authority, the jury's finding that appellant CRC acted with malice and that that malice was a proximate cause of the accident removes all issues of negligence from the case and, therefore, the trial court properly found that the decedent's estate was entitled to recover the full amount of the compensatory damages assessed by the jury.

Civ.R. 50(A)(4) provides that:

"When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

In considering a motion for a directed verdict, neither the weight of the evidence nor the credibility of the witnesses

is for the court's determination. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 429, 344 N.E.2d 334, 338. Where there is substantial evidence to support the position of the party against whom the motion is directed upon which reasonable minds may reach different conclusions, the motion must be denied. *Id.*

In *Schellhouse*, *supra*, the Supreme Court of Ohio determined that if a railroad committed an intentional tort with malice and if that intentional tort was a proximate cause of the plaintiff's damage, the negligence of the plaintiff's decedent is not a defense and the plaintiff would be entitled to full recovery. That court stated that "[a]cts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent." *Id.*, 61 Ohio St.3d at 524, 575 N.E.2d at 456. The *Schellhouse* court noted that:

"Contributory negligence, prior to the enactment of R.C. 2315.19, did not bar recovery in an action predicated upon the willful, wanton or reckless conduct of a defendant. Likewise, the provisions of a statute which operate to prevent or reduce the recovery of a plaintiff due to her comparative negligence should not apply in such a case. Accordingly, in a civil action for tort or wrongful death, a finding by the jury that a plaintiff (or plaintiff's decedent) was comparatively negligent will not defeat or diminish the recovery of damages where the defendant's intentional tort, committed with actual malice, proximately caused the injury." *Id.*, 61 Ohio St.3d at 525, 575 N.E.2d at 457.

Appendix A

In *Brown v. Consol. Rail Corp.* (Oct. 11, 1991), Erie App. No. E-90-35, unreported, 1991 WL 253917, this court, citing *Schellhouse, supra*, determined that a finding of actual malice negates a set-off for damages under Ohio's comparative negligence law.

Even if there had been no evidence presented to support a finding of malice, under the comparative negligence doctrine the fact that the decedent violated state and municipal traffic codes would not automatically establish that she was the proximate cause of the accident and would not preclude competent evidence as to appellant's own negligence. See *Kromenacker v. Blystone* (1987), 43 Ohio App.3d 126, 131, 539 N.E.2d 675, 680; *Case v. Norfolk & W. Ry. Co.* (1988), 59 Ohio App.3d 11, 570 N.E.2d 1132; *Brown, supra*.

In this case, to grant a directed verdict, the trial court, upon its review and assessment of the evidence would have had to conclude that reasonable minds could reach no other conclusion but that the decedent was negligent and that her negligence was the sole proximate cause of her death. Contrary to appellants' assertions, our review of the record indicates that there was evidence presented from which the jury could have reasonably concluded that appellant CRC acted with actual malice or at the very least acted negligently and that its actions were a proximate cause of the accident. We find, therefore, that the trial court did not err in denying appellant's motions for a directed verdict. Accordingly, appellant's first assignment of error is found not well taken.

Appendix A

B

In its second assignment of error appellant asserts that it was denied a fair trial as a result of errors in the court's instructions to the jury. Appellant sets forth several specific areas in which it contends the trial court erred in its instructions: (1) in refusing to instruct the jury that the decedent's intentional violation of known duties could be found to constitute willful and wanton misconduct, and in refusing to submit an interrogatory to the jury on that issue; (2) by instructing the jury as to CRC's alleged intentional misconduct when the evidence did not warrant such an instruction; (3) in failing to charge the jury that the conduct of the Sandusky police officer could be found to be an intervening and superseding act relieving appellants of any liability and in failing to submit an interrogatory to the jury on this issue; (4) in giving jury instructions that were, in general, contradictory and confusing and erroneous as a matter of law; (5) in failing to charge the jury and submit the required verdict forms to the jury as to the claims involving Nelson's liability and Darlene Wightman's property damage claim.

We will first address appellant's assertions as to the specific instructions that it claims were erroneously excluded from the jury charge as well as the corresponding interrogatories that it asserts should have been submitted to the jury.

"It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 75 O.O.2d 331,

348 N.E.2d 135. However, the corollary of this maxim is also true. [Footnote omitted.] 'Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.' Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2. See, also, *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 57 O.O.2d 213, 275 N.E.2d 340, at the syllabus: *'In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.'* " (Emphasis added.) *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, 832.

The use of jury interrogatories is governed by Civ.R. 49(B), which provides in pertinent part:

"The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action on the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

"The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict."

Although Civ.R. 49(B) requires a trial court to submit interrogatories to the jury once it is requested to do so, the court still retains limited discretion "to reject submission of the interrogatories where the request is untimely or the proposed interrogatories are ambiguous, confusing, redundant, or otherwise legally objectionable. Proper jury interrogatories must address determinative issues and must be based upon trial evidence." *Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 107, 592 N.E.2d 828, 836. In *Ramage, supra*, the court, citing *Ragone v. Vitali & Beltrami, Jr., Inc.* (1975), 42 Ohio St.2d 161, 165-166, 71 O.O.2d 164, 166, 327 N.E.2d 645, 649, stated:

"Authority is still vested in the judge to control the substance and form of the questions, and if the interrogatories are not based on the evidence, are incomplete, ambiguous or otherwise legally objectionable, the judge need not submit them to the jury." 64 Ohio St.3d at 107-108, 592 N.E.2d at 836.

This court has thoroughly reviewed the arguments of the parties concerning the jury charge, the entire transcript of the proceedings before the trial court and the applicable law. As to appellant's assertions going to the effect of the conduct of the decedent, this court finds that not only would the evidence not support the giving of such an instruction

and interrogatory but the requested instruction and interrogatory were not correct statements of the law. See *Payne v. Vance* (1921), 103 Ohio St. 59, 133 N.E. 85. As to appellant's assertion that the jury charge should have included the instruction and interrogatory as to the Sandusky police officer's conduct being a superseding and intervening cause, we find that the evidence in the record does not support the giving of such an instruction and interrogatory. As to appellant's assertions as to the issue of Nelson's liability not being submitted to the jury, the briefs and the record indicate that the parties stipulated that Nelson could be dismissed from the case and therefore it was not necessary to submit the issue of his negligence to the jury.[4]

As to appellant's assertions that the trial court's jury instructions were generally confusing, contradictory and erroneous:

"A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 19 OBR 8, 10, 482 N.E.2d 583, 585, citing *Parmlee v. Adolph* (1875), 28 Ohio St. 10, paragraph two of the syllabus. "* * * [A]n incomplete charge will constitute grounds for reversal of a judgment where the charge as given misleads the jury." *Marshall, supra*, 19 Ohio St.3d at 12, 19 OBR at 10, 482 N.E.2d at 585.

---

4. The argument concerning Darlene Wightman's property damage claim and the punitive damage award will be dealt with later in this opinion.

Appendix A

Upon consideration of the jury charge as a whole, in light of the evidence in the record and the applicable law, this court finds that charge met the standard set forth in *Marshall, supra*. Accordingly, appellant's second assignment of error is found not well taken.

C

In its third assignment of error appellant asserts that the trial court committed prejudicial error by admitting the opinion testimony of appellees' witness, William Berg, and the testimony of Glen Slyker. Appellant argues that: (1) Dr. Berg's testimony should not have been submitted to the jury as that of an "expert" because his testimony contained nothing of a scientific or technical nature and contained nothing that was necessary to assist the jury in understanding and deciding the facts before it; (2) the trial court erred in admitting Berg's testimony as to the existence and breach of legal duties; (3) Berg's testimony was based upon facts that were not in evidence; (4) Berg should not have been allowed to testify as to CRC's private company rule; and (5) witness Glen Slyker should not have been allowed to testify as to the applicability of certain company rules of the Norfolk & Western Railway.

Evid. R. 702 states:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

Appendix A

Evid. R. 703 states:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

Evid.R. 704 states:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

The admissibility of expert testimony is a matter within the discretion of the trial court and its ruling thereon will not be disturbed on appeal absent a showing of an abuse of that discretion. *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153, 563 N.E.2d 339. An abuse of discretion implies an attitude by the trial court that is unreasonable, arbitrary, or unconscionable. *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St.3d 59, 61, 29 OBR 441, 443, 505 N.E.2d 957, 958.

At the trial, appellees' witness, Dr. William Berg, was permitted to testify as an expert over appellants' objections. Berg first testified as to the materials he had reviewed and what he did to prepare for testifying at the trial. Berg then reviewed the conditions that existed at the time of the collision. Berg testified as to the time and space relationship of the trains and vehicles, and the perception points and reaction times of the motorists based upon all the impacting factors, including how the physical characteristics of the crossing grade affected those relationships. Berg also

testified as to the placement and operation of railway warning devices and how their unnecessary activation creates credibility problems and hazards which lead to accidents, which is a phenomenon that is well known to the railroad. Berg also stated that the railroad industry recognizes the hazards created by the unnecessary operation of automatic warning signals and, therefore, certain operating rules contain recommendations for such situations. Berg testified that CRC's Operating Rule 105[5] was such a rule and that it acknowledges that one train can obscure the approach of another and create a hazard by directing that to avoid unnecessary operation of automatic warning devices, engines and/or cars are not permitted to stand longer than necessary. Berg also testified that that particular rule contains a provision that when automatic warning devices are not operating properly the dispatcher must be notified and approaching trains must be directed to prepare to stop at crossings until highway traffic is protected. Berg then stated that, in his opinion, the principal causal factors of this collision were: the sight obstruction created by the stopped train; the operation of the warning devices for such a period of time that they created a credibility problem; the fact that the crew observed the conditions that existed, yet took no action to protect approaching motorists; and the fact that appellant's rules were unclear as to what action the crew

---

5. A portion of CRC's Operating Rule 105 was read to the jury as follows: "When equipment is standing and obscuring the view of highway traffic, an employee must protect highway traffic against movement on adjacent tracks. Equipment stored on tracks close to a public crossing must be placed to permit a clear view for highway traffic using the crossing. When space permits, equipment must be placed three hundred (300) feet from the crossing."

was to take in such circumstances. Berg also testified that the decedent's conduct was reasonable under the circumstances since any reasonable person would have believed that the warning devices were not functioning properly and that it was safe to proceed cautiously. Berg testified also as to reasonable alternatives that were available to appellants which would have accommodated their needs and interests while at the same time protected the crossing and the motorists.

Later in the trial Glen Slyker, a retired engineer for Norfolk & Western Railway, was called to testify by appellees as a rebuttal witness.[6] Slyker testified that he reviewed the operating book for Norfolk & Western Railway and that there were rules contained therein that applied in the type of situation that existed in this case. Slyker also testified that based upon his experience and his observation of customs and practices observed during his years with Norfolk & Western, he had encountered many situations in which he had to stop a train within three hundred feet of a crossing and that there were rules in the book governing such situations. He cited specifically to Rule 101(3) which provided that when the end of a train stands near a grade crossing, a crew member must, when practicable, protect the crossing from movement on the adjacent tracks.

---

6. Slyker was called to rebut testimony by appellant CRC's witness, Louis Nelson. Nelson testified that he had reviewed the operating rules for two other major railroads operating in Ohio and found that both Norfolk-Southern Railroad and CSX had rules similar to CRC's Operating Rule 105. Nelson stated that these two rules, N.S. 103(c) and CSX Rule 100-F provided that the required distances for storing equipment near a crossing was only 100 feet.

Appendix A

Upon consideration of the testimony of William Berg and the law as set forth above, this court finds that the trial court did not abuse its discretion in finding that it was necessary to assist the jury and that the admission of this testimony was in compliance with Evid.R. 703, 704 and 705. This court finds further that the trial court did not abuse its discretion in admitting Berg's testimony as to CRC's Rule 105 and Glen Slyker's testimony as to the rules of other railway companies, particularly given the cautionary instructions that were read to the jury concerning their consideration of these rules.[7] See *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164, 529 N.E.2d 1382, 1384. Accordingly, appellant's third assignment of error is found not well taken.

As its fourth assignment of error, appellant sets forth a general assignment of error encompassing all other errors that occurred at trial. Since appellant has set forth no arguments in support of this assignment of error, we need not address it. App.R. 12(A); *State v. Rivers* (1977), 50 Ohio App.2d 129, 135, 4 O.O.3d 100, 103, 361 N.E.2d 1363, 1367. Accordingly, appellant's fourth assignment of error is found not well taken.

---

7. The following cautionary instruction was given to the jury both during the course of the trial and in the court's final instructions:

"You are cautioned that the legal standard of care one party owes to another is set by the law. Just as one party may not ignore a duty owed to another by the promulgation of a private rule, a legal duty is not created to a non-employee by the promulgation of a private rule and the violation of such a rule, even if proven, is not negligence in and of itself. Any alleged violation of a company rule may be considered by you along with all other evidence presented during trial on the issues presented."

Appendix A

II. CROSS-APPEAL

A

In their first cross-assignment of error appellees assert that the trial court erred by refusing to submit the issue of punitive damages to the jury. In support of this assignment of error appellees argue that that portion of R.C. 2315.21,[8] which provides that the amount of punitive damages to be awarded is to be determined by the court and not the jury violates Section 5, Article I of the Ohio Constitution[9] since it denies the right to a jury trial on the issue of damages to persons who suffer injury as a result of intentional wrongdoing. Appellees assert that Article I guarantees an individual the opportunity to have all factual issues in a civil action decided by a jury and that, although the Supreme Court of Ohio has not ruled on the constitutionality of this particular

---

8. R.C. 2315.21(C) provides in pertinent part:

"(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive damages.

"(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

9. Section 5, Article I of the Ohio Constitution provides:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of any verdict by the concurrence of not less than three-fourths of the jury."

statute, its decision in *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 533 N.E.2d 743, makes it clear that the statute is unconstitutional.

In response, appellant argues that this issue is moot since there is no actual property damage award in the record on which to base an award of punitive damages. In the alternative, appellant asserts that in *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737, the Supreme Court of Ohio determined that, since the right to punitive damages is an equitable right, as opposed to a legal one, a litigant has no constitutional right to have a jury determine the amount of punitive damages.

Initially we note that "[a]ll legislative enactments enjoy a presumption of constitutionality." *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 551 N.E.2d 938. A statute will be declared invalid only if its unconstitutionality is shown beyond a reasonable doubt. *Zoppo v. Homestead Ins. Co.* (July 8, 1993), Cuyahoga App. No. 62926, unreported, 1993 WL 262641, citing *Cincinnati Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 376, 12 O.O.3d 327, 331, 390 N.E.2d 813, 819.

We find appellees' assertion that the Supreme Court's decision in *Kneisley*, *supra*, requires us to find R.C. 2315.21 unconstitutional to be without merit. That case concerns the right to a jury trial for the assessment of damages in intentional tort actions against an employer and we decline to apply it to the case before us.

We do find, however, that the decision of the Supreme Court in *Digital & Analog Design Corp., supra*, is dispositive of this issue. In that case the court determined that an award of attorney fees in a tort action does not compensate the victim for damages flowing from the tort but is, rather, a "punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages." *Id.*, 63 Ohio St.3d at 662, 590 N.E.2d at 742. The *Digital* court found that there was no constitutional right to a trial by jury on the issue of what amount of attorney fees should be awarded in a tort action. *Id.* That court also stated:

"The General Assembly, through its enactment of R.C. 2315.21 and the amendment of R.C. 2315.18, [footnote omitted] has now clarified that it is a proper function for the trial court, in a jury trial in a tort action, to determine the amount of punitive damages, but that the issue of liability is expressly reserved to the jury. Although these provisions were not in effect at the time the instant cause of action arose, we are nonetheless persuaded that the approach taken by the legislature is the proper course for the development of the common law of this state." *Id.*, 63 Ohio St.3d at 663, 590 N.E.2d at 742-743.

In accordance with the foregoing this court finds that appellees have failed to demonstrate beyond a reasonable doubt that the provision of R.C. 2315.21 that directs that the court determine the amount of punitive damages to be awarded in a tort action once the finder of fact determines liability therefor is unconstitutional. See *Zoppo, supra*. Accordingly, appellees' first assignment of error is found not well taken.

Appendix A

B

In their second cross-assignment of error appellees assert that the trial court erred in refusing to award punitive damages, attorney fees and costs to Darlene Wightman on her property damage claim. Appellees argue that, while the amount of punitive damages to be awarded lies within the discretion of the trial court, it was not within the court's discretion to fail to award any punitive damages when the jury expressly found that they are to be assessed. Appellees argue further that once the finder of fact determines that punitive damages may be recovered, an award of attorney fees and costs is also warranted.

In response, appellant argues that the trial court properly denied an award of punitive damages because there is no verdict or judgment on Darlene Wightman's property damage claim and punitive damages are not recoverable in a wrongful death action; that while appellant did stipulate at trial as to the value of the car, it did not stipulate as to the issue of liability, since the question of Darlene's comparative negligence was at issue; and that the issue of their liability for the damage to Darlene Wightman's car was never submitted to the jury and no judgment was entered in her favor on that claim. Appellant argues in the alternative that even if there was a judgment or verdict on the property damage claim, the trial court has discretion to refuse to grant an award of punitive damages based upon a finding that actual damages were insufficient to support the award, citing *Ray v. Engard* (Nov. 22, 1985), Lucas App. No. L-85-051, unreported, 1985 WL 8229; *Case v. Norfolk & W. Ry. Co.* (1988), 59 Ohio App.3d 11, 570 N.E.2d 1132; *Clark v. Totten*

(Apr. 24, 1986), Cuyahoga App. Nos. 50535, 50536, unreported, 1986 WL 4970; *Williams v. McCrory Corp.* (Jan. 11, 1985), Montgomery App. No. 8963, unreported, 1985 WL 6680. Finally, appellant asserts that the trial court's decision to award no punitive damages was proper in that the evidence presented at trial did not support a finding of actual malice.

It is not disputed that punitive damages are not recoverable in a wrongful death action. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 8 O.O.3d 11, 374 N.E.2d 411. The recovery of punitive damages in tort actions is provided for, however, by R.C. 2315.21, which provides in pertinent part:

"(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

"(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

"(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

"(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages.

"(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

"(3) In a tort action the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages."

The first question we must address is whether the jury's determination that CRC is liable for punitive damages was proper without a verdict or judgment on Darlene Wightman's property damage claim. The complaint in this action set forth a claim for property damage for Darlene Wightman's car, which was the vehicle the deceased was driving, and for an award of punitive damages. During the course of the trial the parties agreed to stipulate to the value of the vehicle. At the conclusion of the trial, the court did not instruct the jury on Wightman's property damage claim or submit a verdict form on that issue. Although there appears to be no judgment entry in the record as to the property damage claim, we find that, since the jury determined that liability for the collision rests with appellant CRC based on its finding of actual malice, appellee Darlene Wightman is, as a matter of law, entitled to judgment on the property damage claim in the amount stipulated by the parties. Accordingly, upon the trial court, on remand, entering the appropriate judgment on the property damage claim, there is a proper basis for the award of punitive damages. As to the issue of comparative negligence, we find that since the jury determined that CRC acted with malice, the existence of contributory negligence

would not defeat or diminish her recovery of damages. *Schellhouse, supra.*

Having determined that there is a proper basis for the award of punitive damages, we must then address the issue of whether the trial court abused its discretion in awarding no punitive damages. Appellant asserts that the trial court properly refused to award any amount for punitive damages because the actual damages of $2,000 were insufficient to support an award. Again, due to its summary entry, we do not know the basis for the trial court's denial of punitive damages.

Upon review of R.C. 2315.21, however, we find that it does not require that the actual damages upon which an award of punitive damages is based be substantial. Although the General Assembly has not set forth the factors to be considered, our review of cases dealing with awards of punitive damages compels us to conclude that the amount of the actual damages sustained should not be the sole factor in determining the appropriate award of punitive damages. Rather, a number of factors must be considered by a trial court in making its determination, while keeping in mind that the purpose behind an award of punitive damages is punishment of the guilty party and the deterrence of similar conduct in the future. See, generally, *Villella v. Waikem Motors, Inc.* (1989) 45 Ohio St.3d 36, 543 N.E.2d 464; *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416, 419. These factors would necessarily include, but are not limited to, the nature of the conduct that resulted in the injury, the financial condition of the defendant, the amount necessary to deter future similar

conduct, and prior or similar acts by the defendant, as well as the amount of actual or compensatory damages. *Villella, supra*; *Spadafore v. Blue Shield* (1985), 21 Ohio App.3d 201, 21 OBR 215, 486 N.E.2d 1201; *Estate of Morad v. Task* (Mar. 10, 1994), Cuyahoga App. No. 64787, unreported, 1994 WL 78157.

In light of all of the foregoing, this court finds that the trial court abused its discretion in failing to award any amount for punitive damages after the jury determined that appellees are entitled to such an award.

As to appellant's assertion that the evidence did not support the jury's finding of actual malice, the term "actual malice" is defined as: "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis *sic.*) *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

Upon consideration of the entire record of proceedings in the trial court, we find that there was clear and convincing evidence to support the jury's finding of actual malice on the part of appellant CRC.

As to the issue of attorney fees, although our review of the record shows that appellees requested an award of attorney fees and costs, and the issue was briefed by both parties, there appears to be nothing in the record to indicate that the trial court ever ruled on that request. This issue is therefore not before us on appeal but remains for the trial court to address upon remand by this court.

Accordingly, appellees' second cross-assignment of error is found well taken in part and not well taken in part.

C

In their third cross-assignment of error appellees assert that the trial court erred in refusing to order CRC to pay interest at the statutory rate on the $1,000,000 compensatory damage award from the date of the jury's verdict, or in the alternative, for each day that the entry of judgment was delayed as a result of appellants' motion to disqualify the trial judge.

As to this issue as well, our review of the record indicates that, although this matter was raised and briefed, no disposition was made by the trial court. This issue therefore is not before us on appeal but remains for the trial court to address upon remand by this court. Accordingly, appellees' third cross-assignment of error is found not well taken.

On consideration whereof, this court finds that the decision of the Erie County Court of Common Pleas is affirmed in part and reversed in part. The decision of that court denying appellee, Darlene Wightman, any award of punitive damages is reversed and this case is remanded to the trial court for determination as to the amount of punitive damages to which appellee, Darlene Wightman, is entitled in accordance with this opinion and for disposition of all remaining matters.

Appendix A

Court costs assessed to appellants.

Judgment affirmed in part,
reversed in part
and cause remanded.

GLASSER and SHERCK, JJ., concur.

APPENDIX B — EXCERPTS FROM TRIAL TRANSCRIPT OF THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO DATED MAY 20, 1996

IN THE COMMON PLEAS COURT OF
ERIE COUNTY, OHIO

No. 89-CV-4161

DARLENE M. WIGHTMAN, Admx. of the Estate of
MICHELLE L. WIGHTMAN, Deceased, et al.

Plaintiffs

– vs –

CONSOLIDATED RAIL CORPORATION, et al.

Defendants

HONORABLE JOSEPH E. CIRIGLIANO,
Presiding

May 20, 1996

* * *

[186] * * *

Q Go slowly, Mr. Knehr, if you would.

A Can I sit down?

THE COURT: Sure, go ahead.

A There were a couple of cars in front, they headed up this way, and we followed them. A couple of cars got up here and slowed down, went around, and another car would come this way. And then finally it was their turn, and we were behind them still. They got up there, slowed down a couple of miles an hour, started going around.

Q What was your intention at that point?

A I was going to wait for them to go, and probably wait for a car maybe to come this way, and kind of a view and then go around myself. And started — well, the train was parked over here about one hundred foot away with its headlight on, and there was nobody there to, you know, direct traffic or anything, the cop was down here. They started going around, got about halfway or so, and all of a sudden the light got really bright. I didn't hear a horn or anything, the only thing I knew about the train being there was another headlight.

Q Then what happened? How long after you saw that [187] light, how long elapsed until the car was hit?

A It was only a couple of seconds. They didn't have a chance it didn't seem like. They weren't going to make it as slow as they were going. And the train came up, hit them, pushed them off and over the tracks. The train finally slowed down, stopped. During that time, Tim got out, he ran down and got the cop. And he came up, he called on the CB, and waited for the train to stop to see

what happened to the car. And then I forgot, and I was scared, didn't know what to do. And that's it.

* * *

[300] * * *

MR. MURRAY: That's true. One of the elements that the Court of Appeals has laid out specifically is the nature of the conduct. Why in the world would you (inaudible) because you don't think the nature of the conduct is very serious. You have got the police officer (inaudible) for your opening statement. You're going to bring in a reconstructionist. Yesterday you introduced the fact, you suggested that you could see the headlights.

MR. HOWES: I'm not — who said I'm bringing in a reconstructionist?

MR. MURRAY: You said in your opening statement that you could see the headlight and you're suggesting for something like twelve seconds. And all I'm trying to do is —

MR. HOWES: Am I going to be allowed to bring that person in here to show that, Judge?

THE COURT: Pardon?

MR. HOWES: Am I going to be allowed to do that?

Appendix B

[301] MR. MURRAY: I would think if he can show that she could see the headlight for twelve seconds, of course, he should be able to bring (inaudible).

THE COURT: Sure. He didn't have a problem with that. So I will let you do that.

* * *

[626] * * *

Q Another thing that was testified to by the expert for Plaintiff was this and let me read the answer that he gave, he said, "It's fruitless to attempt to put in a physical system that's permanently located at one location only and say that we're going to solve this problem, I mean the problem similar to the one encountered in this accident, because you can't predict when a problem is going to occur," would you agree with that?

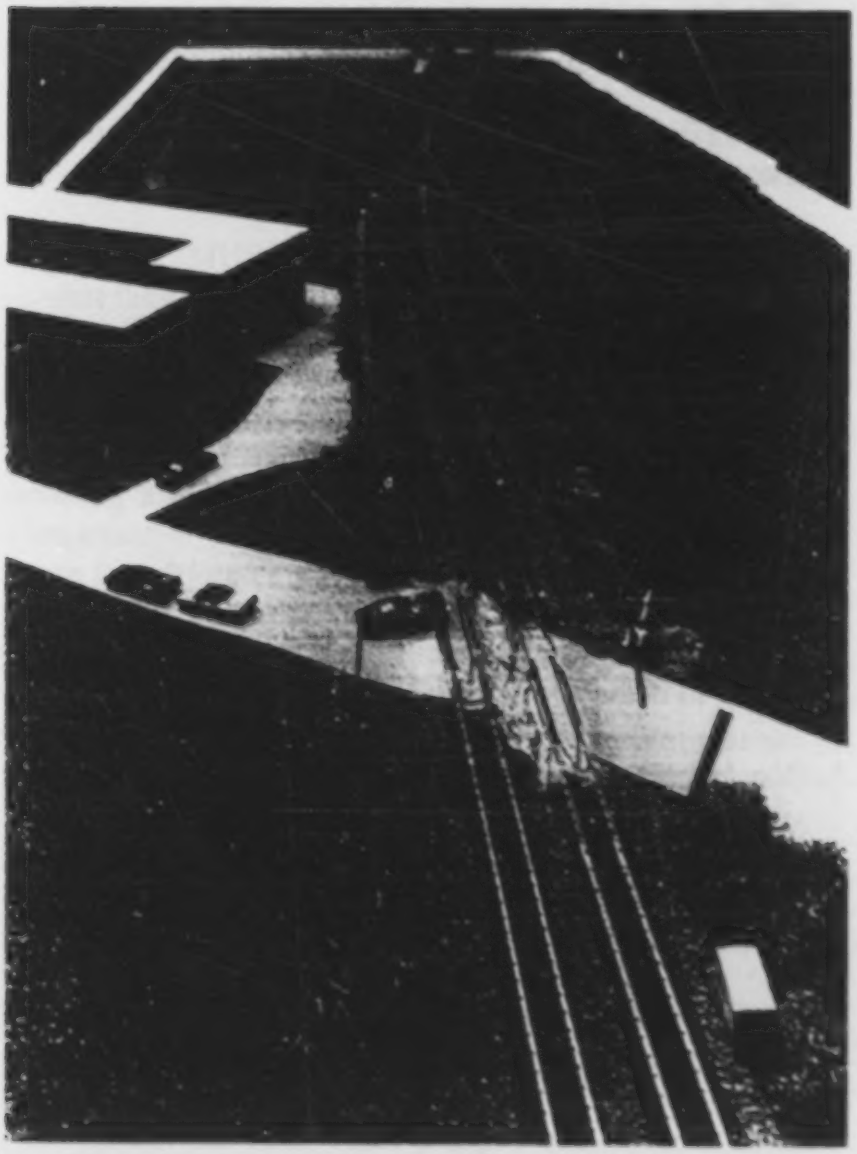
A No, I don't agree with that.

Q There are locations where you can predict because of the nature of the train movements that this type of [627] thing could have occurred?

A Well, this type of thing could occur at so many locations.

* * * *

APPENDIX C — PHOTOGRAPH OF MODEL OF ACCIDENT SITE



APPENDIX D — CASES IN WHICH THE MURRAY & MURRAY CO., L.P.A. WAS LEAD COUNSEL FOR A PARTY OR *AMICUS CURIAE* IN THE OHIO SUPREME COURT

Delli Bovi v. Pacific Indemnity Co., 85 Ohio St. 3d 343 (1999); Stacy v. Nationwide Mut. Ins. Co., 85 Ohio St. 3d 1203 (1999); State ex rel. Banc One v. Walker, 86 Ohio St. 3d 169 (1999); Waite v. Progressive Ins. Co., 85 Ohio St. 3d 1226 (1999); Wightman v. Consolidated Rail Corp., 715 N.E.2d 546 (1999); Cope, et al. v. Metro. Life Ins. Co., 82 Ohio St. 3d 426 (1998); Landis v. Grange Mut. Ins. Co., 82 Ohio St. 3d 339 (1998); Chance v. BP Chemicals, Inc., 77 Ohio St. 3d 17 (1996); Coleman v. Sandoz Pharmaceuticals Corp., 74 Ohio St. 3d 492 (1996); Hacker v. Dickman, 75 Ohio St. 3d 118 (1996); Roberts v. United States Fid. & Guar. Co., 75 Ohio St. 3d 630 (1996); State ex rel. Lyons v. Zaleski, 75 Ohio St. 3d 623 (1996); Weston v. Weston Paper & Mfg. Co., 74 Ohio St. 3d 377 (1996); Kenty v. Transamerica, 72 Ohio St. 3d 415 (1995); Ross v. Tom Reith, Inc., 71 Ohio St. 3d 563 (1995); Sharp v. Norfolk & Western Ry. Co., 72 Ohio St. 3d 307 (1995); Borsick v. State Farm Fire & Cas. Co., 68 Ohio St. 3d 1221 (1994); Frazier v. Depinet, 69 Ohio St. 3d 1211 (1994); Freeman v. Norfolk & Western Ry. Co., 69 Ohio St. 3d 611 (1994); Horner v. Toledo Hospital, 70 Ohio St. 3d 1211 (1994); Leber v. Smith, 70 Ohio St. 3d 548 (1994); Phung v. Waste Management, 71 Ohio St. 3d 408 (1994); Sanderson v. Ohio Edison Co., 69 Ohio St. 3d 582 (1994); Sorrell v. Thevenir, 69 Ohio St. 3d 415 (1994); Zoppo v. Homestead Insurance Company, 71 Ohio St. 3d 552 (1994); Borsick v. State Farm Mut. Auto. Ins. Co., 68 Ohio St. 3d 81 (1993); Brinkman v. Ross, 68 Ohio St. 3d 82 (1993); Polikoff v. Adam, 67 Ohio St. 3d 100 (1993); Manufacturer's Natl. Bank of Detroit v. Erie

County Road Commission, 63 Ohio St. 3d 318 (1992); Motorists Mutual Ins. Co v. Andrews, 65 Ohio St. 3d 362 (1992); Motorist Mut. Ins. Co. v. Said, 63 Ohio St. 3d 690 (1992); Padilla v. YMCA of Sandusky Co., 64 Ohio St. 3d 1439 (1992); Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624 (1991); Schellhouse v. Norfolk & Western Ry. Co., 61 Ohio St. 3d 520 (1991); Drage v. Ameritrust Corp., 49 Ohio St. 3d 604 (1990); Huston v. Konieczny, 52 Ohio St. 3d 214 (1990); Renfro v. Smith Labs, 52 Ohio St. 3d 27 (1990); State ex rel. The Ohio Company v. Maschari, 51 Ohio St. 3d 18 (1990); Stepak v. Schey, 51 Ohio St. 3d 6 (1990); Burris v. Grange Mut. Companies, 46 Ohio St. 3d 84 (1989); Crosby v. Beam, 47 Ohio St. 3d 105 (1989); Digital v. Analog Design Corp. v. North Supply Co., 44 Ohio St. 3d 36 (1989); Miller v. Wikel Mfg. Co., Inc., 46 Ohio St. 3d 76 (1989); Carney v. McAfee, 35 Ohio St. 3d 52 (1988); Gressman v. McClain, 40 Ohio St. 3d 359 (1988); Sharp v. Norfolk & Western Ry. Co., 36 Ohio St. 3d 172 (1988); Warner v. Waste Management, Inc., 36 Ohio St. 3d 91 (1988); Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397 (1987); Horman v. Veverka, 30 Ohio St. 3d 4 (1987); Viock v. Stowe-Woodward Co., 34 Ohio St. 3d 602 (1987); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100 (1986); Jones v. VIP Development Co., 15 Ohio St. 3d 90 (1984); Kisil v. City of Sandusky, 12 Ohio St. 3d 30 (1984); Sumwalt v. Allstate Ins. Co., 12 Ohio St. 3d 294 (1984); Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983); Noroski v. Fallet, 2 Ohio St. 3d 77 (1982); Ruta v. Breckenridge-Remy Co., 69 Ohio St. 2d 140 (1982); Masheter v. Welschenbach, 48 Ohio St. 3d 8 (1976); State v. Chaffin, 30 Ohio St. 2d 13 (1972).

APPENDIX E — EXCERPTS FROM TRIAL TRANSCRIPT OF THE COURT OF COMMON PLEAS, ERIE COUNTY, OHIO DATED OCTOBER 16, 1990

IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO

CASE NO. 89-CV-416

DARLENE M. WIGHTMAN, Admrx. of the Estate of Michelle L. Wightman, Deceased, et al.,

Plaintiffs

– vs –

Consolidated Rail Corp., et al.,

Defendants.

TRANSCRIPT
VOLUME ONE

TRANSCRIPT of MOTIONS BEFORE TRIAL; TRIAL OF OCTOBER 16, 17, 18, 19, 22, 23, 24, 25, 26, 29 and 30, 1990; and HEARINGS OF NOVEMBER 3, 1990; AUGUST 9, 1991; AND SEPTEMBER 20, 1991, had before HONORABLE ANN B. MASCHARI, Judge, Court of Common Pleas, Erie County, Ohio.

* * *

[1062] Q Now, I want to go over very, very carefully with you as you think about this, Michelle .... Stephanie,

Appendix E

I want to go through every moment that evening when you can recall seeing Michelle Wightman with anything of an alcoholic nature in her hand, whether she had it in her hand or whether she's actually drinking it; okay?

A (No audible response).

Q Now, can you remember approximately when it was that evening that you first saw Michelle Wightman with something of an alcoholic nature in her hand?

A It was about ten . . . . about quarter to nine. It was about fifteen minutes before we went and picked up Carrie. We . . . . Michelle went in her sister's room. That's where we had it kept, in her sister's room, and she got a wine cooler out and I seen her open it and I seen her take a sip of it.

Q All right. Now, is that the first time that evening you'd seen Michelle drink anything?

A Yes.

Q Did you observe how much of it she drank?

A No. I know it wasn't much because it was still . . . . I seen that it was full. It wasn't —

Q Okay. Now, just try and focus on that for a minute. You saw her take a sip?

A Yeah.

Appendix E

[1063] Q And what did she do with it?

A She set it down.

Q Now, did you happen to observe how much was in that wine cooler when she set it down?

A No, I don't . . . . I don't pay attention.

Q Had you been with Michelle most of the time at least up till a quarter to nine when you saw her take this sip?

A Yeah, I was with her the whole time.

Q And that's the first time you saw her take anything —

A Yes.

Q — of an alcoholic nature that night?

A Yes.

Q Did you see her drink any pop or anything like that?

A No. Earlier in the day but not at night.

Q Now, at that point, if I understand it, was that when Carrie called up and said come get me?

A Yes.

Q Did you go with Michelle?

A Yes.

Q Was Michelle perfectly normal in the way she talked and walked and drove a car?

A Yes.

Q And you went over and got Carrie at her house?

* * *

[1071] Q Now, did you have an opportunity at that time, Stephanie, to observe Michelle and how was she acting and so forth?

A She was fine. She was normal like how she always was.

Q How is she always .... how is it that she always was, Stephanie?

A She was the kind of person outgoing; she would make friends with you; she was real friendly; she was .... she was fun to be around.

Q Now, at that point, at the point where Michelle shakes you out of your sleep and says you want to come with me while I take Carrie home, thinking back again to everything that you've now been able to remember about that evening, do you remember Michelle having anything of an alcoholic nature in her hand or drinking it other than those two occasions you've described; that is, when she took a sip and put it down on the table or when you

saw her drinking what you don't know was the same wine cooler or a different one after you got back?

A I seen her with two wine coolers and two beers in her hand. She was taking them into the living room here everybody . . . . there was a whole . . . . there was Bobby and his friends were there.

Q All right. Now, I don't think . . . . I don't think that . . . . is that on the statement about her having the [1072] two wine coolers and two beers in her hand taking them in? I don't remember.

A No.

Q Okay, all right. So if the question is . . . . if I understand you, Stephanie, if the question is what you saw Michelle Wightman consume, it would have been two occasions when you saw her drinking from either two different wine coolers or the same wine cooler; is that right?

A Right.

Q Now, if the question is did you see her with anything of an alcoholic nature in her hand, then what is the answer?

A I seen her with the wine cooler that she was drinking and the two other ones and the two beers that she was taking into the living room.

Q I see. Now, when you saw her with these two wine coolers and two beers, what, was she carrying them into where the gang was gathered?

A Yes.

Q Is that it?

A Yeah.

Q All right. Now, at any time did you see Michelle Wightman open a bottle of beer that evening?

A I don't know. I don't —

[1073] Q Did you ever see her take a sip from any bottle of beer that evening?

A Not that I remember. I remember hearing Bobby say . . . . Bobby said —

Q Don't get into what other people said.

A Okay, no.

Q Just what you saw.

A No.

Q At any time that evening did you see Michelle Wightman take a drink from any bottle of beer or can of beer?

A No.

Q Stephanie, can you remember any time that you've been with Michelle in your entire life when you've seen her drink a beer?

A No.

Q You have seen her drink wine coolers?

A Yes.

Q Have you seen her drink wine coolers in fact at home with her mother present?

A Yes.

Q Now, Stephanie, what kind of a . . . . you may not . . . . whether you zonk out or not, what kind of a sleeper are you?

A I'm a heavy sleeper.

Q And when you went to sleep that evening, do you think . . .

* * * *

APPENDIX F — DEFENDANT'S MOTION FOR RECUSAL AND CONTINUANCE OF THE TRIAL

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

CASE NO: 89-CV-416

JUDGE MASCHARI

DARLENE M. WIGHTMAN, et al.,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

DEFENDANT'S MOTION FOR RECUSAL AND CONTINUANCE OF THE TRIAL

Defendant, Consolidated Rail Corporation, respectfully moves the court to recuse herself from this case and to continue the trial. Defendant submits this motion on the basis that events occurring after the remand order from the court of appeals have caused defendant to lose confidence in the impartiality of the court.

In support of the motion, defendant submits copies of the attached letter which it hand-delivered to Judge Maschari on March 31, 1995, and the letter sent by plaintiff's counsel to the court on January 25, 1995.

Appendix F

Respectfully submitted,

VOGELGESANG, HOWES,
LINDAMOOD & BRUNN

s/ Thomas R. Himmelspach
Philip E. Howes (0016390)
Thomas R. Himmelspach (0038581)
Attorney for Defendant
400 Tuscarawas Street, West –
Suite 200
P.O. Box 20870
Canton, OH 44701-0870
(216) 456-3483
FAX: (216) 456-9533